Supreme Court, U.S.
FILED
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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MELVIN GILMORE , PETITIONER

vs.

U.S. DEPARTMENT OF LABOR, Director
Office of Workers Compensation Program,

EMPLOYEES COMPENSATION APPEALS BOARD,

U.S. SECRETARY OF LABOR. RESPONDENTS

_____

ON PETITION FOR WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE 11TH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

MELVIN GILMORE, pro se (Petitioner)
1511 OXFORD HEIGHTS COURT
ENGLEWOOD, FLORIDA, 34223

1-(941)-474-5149

QUESTIONS PRESENTED

1. Does 5 U.S.C. 8128(b) apply only to the plain language in the statute of "allowing or denying Payment, or apply to all decisions after the initial decision?

2. Does 8128(b) apply only to employees outside the United States who are non-citizens as the previous codification under 5 U.S.C. 793 stated, or to both groups.

3. If 5 U.S.C.8128(b) bars the court from interpreting the statutes then how did this Court have jurisdiction to interpret 5 U.S.C. 8132 in Lorenzetti v. U.S. 468 US 897 (1983)?

4. Can a board appointed by the Secretary that serves at the pleasure of the Secretary without tenure, take property, without review from the district court, be constitutional under Article III and the Due Process clause in the 5th, 6th and 14th Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be granted to review the judgment below.

OPINIONS BELOW

PETITION A ..U.S.C.A. Denied Rehearing dated 2/3/2004.

PETITION B ....U.S.C.A. initial decision AFFIRMING the decision of the district court, dated 11/10/2003

PETITION C .. District Courts decision dated 11/27/002

PETITION D .. ORDER denying review of the Legislative History, Violations of Statutes, Fraud and Abuse dated 5/20/2002

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The U.S.C.A. 11th Circuit has affirmed a decision of the district court whose decision was in conflict with the decisions of the United States Supreme Court in Crowell v Benson, 285 U.S. 52 (1931) and reviewed in NORTHERN

PIPELINE CO. v. MARATHON PIPE LINE CO., 458 U.S. 50 (1982) and U.S.C.A Federal Circuit. It has also departed from this Court's interpretation of the Federal Rules of Civil Procedure 56 as interpreted by this court in CELOTEX CORP. v. CATRETT, 477 U.S. 317 (1986).
The Court of Appeals has affirmed the district courts decision that the courts are barred from reviewing Public Law 89-488 enacted on July 4, 1966. It was the last legislative change in the Act before Title 5 was Codified. 89-488 showing how congress intended the Act to be interpreted. The district court dismissed the issue to review legislative intent in 5 U.S.C. 8101 e.g., stating the court had no jurisdiction to review the Act. The decision was contrary to Article III of the U.S. Constitution. Public Law 89-488 has NEVER been reviewed by any court. The decision of the district court was arbitrary and capricious in that it ignored the evidence presented to that court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III
United States Constitution, 5th Amendment
United States Constitution 6th Amendment
United States Constitution 14th Amendment
5 U.S.C. 8101 e.g.
Public Law 89-488 enacted on July 4, 1966
Public Law 89-554 enacted to codify Title 5 on September 6, 1966

STATEMENT OF THE CASE

The petitioner asked the district court to review the legislative history of 5 USC 8128(b) because the interpretation that the Secretary of Labor has presented to the courts and adopted by the lower court is, (1). repugnant

to Article III, and the 5th and 14th Amendment in the U.S. Constitution. (2). The interpretation is in conflict as to what congress stated it intended in the last legislative act before the codification of Title 5. (3). The petitioner asked the district court that after review of the legislative history and the constitutional issues, it also review acts of fraud committed by those acting on behalf of the Secretary of Labor. (4). The petitioner charged that the agency denied benefits that congress provided for those on the rolls of workers compensation. (5). The petitioner charged that the Secretary took property away from him in violation of his constitutional right to due process before an impartial decisionmaker as provided under the 5th and 14th Amendment of the U.S. Constitution.

All the issues above were contained in the original complaint in Document 1, filed with the district court.

In the ORDER attached as Appendix D, the court stripped the complaint that the Secretary committed fraud and refused to review the legislative Act to determine what congress intended under 5 U.S.C. 8101 e.g.. The district court only wanted to hear that the claimant was denied a hearing in his termination of benefits.
The District Courts statement, that "Plaintiff challenges the Secretary of Labor's termination of his benefits under the Federal Employees' Compensation Act. ("FECA)), 5 U.S.C. 8101 et seq, ...", clearly shows that the district court failed to read the case. The district court confirms it did not take the complaint seriously. It rubber stamped the decision without any thought. It stated;

> "After carefully reviewing and liberally construing Plaintiff's pro se Complaint (Dkt.1) and subjecting it to less scrutiny than one drafted by an attorney, the court is compelled to dismiss those portions of Plaintiff's complaint to the extent that Plaintiff seeks

judicial review of the Secretary of Labor's Decision(s) relative to Plaintiff's entitlement to benefits, on the grounds that this court lacks subject matter jurisdiction."

The district court failed to listen.[1]

This case was based on the Constitution as interpreted by this court and not a workers compensation case. The lower courts, having adopted the Secretary's interpretation of what this court meant in Lindahl, v OPM, 470 U.S. 768 (1985), have ignored the constitution. 5 U.S.C.8128(b) has nothing to do with forbidding the courts from reviewing the Act. Article III Section 2 in the U.S. Constitution gives the court the right to review laws enacted by congress without exception. Had the district court reviewed the legislative history of the statute the evidence, as to congressional intent, is contained in the statute under the Historical and Revision notes. It would have clarified why this court reviewed 5 U.S.C. 8132 in Lorenzetti v. U.S. 467 U.S. 167 (1984). In 1985 this court cited 5 U.S.C. 8128(b) in Lindahl, supra stating "when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive than that set forth in 8347. The court cited 5 USC 8128(b), footnote 13.[2]

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[1] Audi alteram partem - hear the other side! - a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against [governments], and every branch of them - ... whenever any individual, however lowly and unfortunate, asserts a legal claim.
CARITATIVO v. CALIFORNIA, 357 U.S. 549 (1958)

[2] Foot note 13 "See, e. g., 5 U.S.C. 8128(b) (compensation for work injuries) ("The action of the Secretary [of Labor] or his designee in allowing or denying a payment under this subchapter is - (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise").

The initial decision "to allow or deny a payment" is to establish jurisdiction. Congress gave the Secretary the right to decide the initial decision without regard to the Rules of Evidence or 5 U.S.C. 554 and the decision did not have to be based on substantial evidence, see Crowell v. Benson, supra and Northern Pipeline Co., supra.
To avoid unnecessary litigation, that the Secretary's decision was arbitrary and capricious, congress gave the administrative agency the right to decide the initial decision without judicial review. Judicial review required a decision to be based on substantial evidence and congress said that was not necessary. Had congress intended the Secretary to decide "all questions of law and fact" after the initial decision then congress would have violated the Separation of Power under Article III, Section 2 and this court would have violated 5 U.S.C. 8128(b) when it reviewed 5 U.S.C. 8132 in Lorenzetti v. U.S., supra.

Clearly there is a conflict with what the Secretary states this court meant in Lindahl, supra and the action this court took in Lorenzetti, supra.

The petitioner asked the district court to review the legislative history in order to understand that the Secretary's interpretation was in error. The petitioner asked the district court to do what this court stated was proper.

> "The question whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)."

The court refused.

The U.S.C.A. D.C. Circuit also concurs that the question should be resolved. It stated;

> "This court has yet to decide whether § 8128(b) precludes judicial review of a claim that the Secretary disregarded the plain letter of the law.". If the [Supreme] Court believes that a statutory preclusion of constitutional claims is unconstitutional, it should so hold, *but see* *Webster v. Doe*, 486 U.S. 592, 611 (1988) (Scalia, J., concurring in part and dissenting in part), rather than engaging in this series of disingenuous statutory interpretations." LEPRE GERALD STEVEN v DOL, Docket No. 00-5053, U.S.C.A. D.C. Cir., December 21, 2001.

The Secretary has stated in establishing Case Law, that congress gave the Secretary and only the Secretary the right to interpret 5 U.S.C. 8101 e.g. . This also raises a conflict in the Secretary's interpretation of 8128(b). Under 5 U.S.C. 8151 which is under the Act, congress gave OPM the right to review that statute through the Merit Systems Protections Board (MSPB) whose decisions are reviewable by the U.S. Court of Appeal for the Federal Circuit. The MSPB has stated that the Secretary's interpretation of 5 U.S.C. 8128(b) is overboard. The Board stated;

"The agency argues that this conclusion is based upon an erroneous interpretation of law. We agree and therefore grant the agency's Petition for Review." Miller v U.S.P.S, 26 M.S.P.R. 210 (1985).

The U.S. Court of Appeals, Federal Circuit who reviews the decisions of the MSPB has affirmed the same decisions in other cases. *See*,. Minor v. Merit Systems Protections Board, 819 F.2d 280 (1987).

A district court has reviewed 5 U.S.C. 8128(b) and stated;

> "Unlike 8128, neither 8129 nor its implementing regulations contained a provision that the Secretary's decision is final and conclusive. Section 8128 provides the Secretary with unreviewable discretion in allowing or denying a payment. It has nothing to do with the recoupment of payments which have already been allowed."... "Section 8129 does not provide plaintiff with final authority nor does it bar judicial review. The statute does not prevent defendant from contesting the amount of the overpayment. The motion is granted with respect to defendant's challenge of the Secretary's decision as a deprivation of property without due process of law." U.S. v Vetti, 681 F. Supp. 986 (D.Conn 1988)

The evidence manufactured by the Secretary demonstrates that he/she knew the interpretation it presented to the courts was false. The Secretary suppressed Public Law 89-488 of July 4, 1966, which was the last legislative change made in FECA law before the codification of Title 5. The present law was a codification ACT, under Public Law 89-554 on September 6, 1966.

To this date the lower courts have relied on what the Secretary has told the courts. Not one court has reviewed the legislative history of Public Law 89-488 to see what congress meant, including the Supreme Court.

The plaintiff provided the district court with documented evidence from the U.S Government Printing Office and other legal sources to support his case. The Respondent did not attack any of the evidence presented. Not only did the respondent not attack the evidence it NEVER mentioned the evidence. The district court failed to comply

with this courts interpretation of Rule 56. This court stated;

> "On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex's failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper." CELOTEX CORP. v. CATRETT, 477 U.S. 317 (1986)

The following evidence was provided to the district court prior to the Summary Judgment.
All the statutes in Title 5 were passed by Public Law 89-554 enacted on September 6, 1966. It codified Public Law 89-488 that was passed on July 4, 1966 and, as part of a recodification of the former Title 5. The Judiciary Committee of the House stated the Act was not to change the laws previously enacted but to restate the law without unnecessary language. In House Report 901 which accompanied H.R. 10104. The Committee stated;

> "In the revised title 5, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete statutes have been eliminated."
> "Revision notes.- A revision note has been prepared for each section of the revised title 5 and for each section of title 4, 18, 28, 37, and 39 amended by this bill. The revision note shows the statutory basis or source of the section, and

explains significant changes in and omissions of language."

Under 5 U.S.C. 8124 it confirms that Section 37 of Public Law 89-488 was codified as 5 U.S.C. 8128.

"8124(b)..... 5 App.: 786(b). July 4, 1966, Pub. L. 89-488, Sec. 11(b), 80 Stat. 255."

"In subsection (b)(1), the words "section 8128(a) of this title" are substituted for "section 37" to reflect the codification of section 37 in title 5 United States Code."

Public Law 89-488 Section 37 states;

"Section 37. Judicial Review of the Decision by the Board. (a) Any party in interest may, within the time limit specified in Section 34, file application for judicial review of such decision with the [intermediate or final appellate court].

(b) The court shall have power and jurisdiction to review decisions filed by the Board under this act on matters of law only and to perform such other judicial functions and to hear such other matters as are provided for by this act. The court may affirm, suspend, remand, modify, or set aside, in whole or in part, a decision of the Board or compel administrative action unlawfully withheld or denied. [Appeals from such court may be had as in other civil actions.]

(c) Proceedings to set aside a compensation order or decision shall not be instituted otherwise than as provided for by this act.

(d) Except as hereinafter provided in this subsection, the taking of an appeal shall operate as a supersedeas as to payment of compensation

under the award. In proceedings brought to review administrative action in which an award by the hearing officer or Director has been affirmed by the Appeals Board the court may after at least three days' notice to all parties in interest hear an application by the employee for the payment of compensation required under a compensation order or decision pending the outcome of the appeal. If after summary hearing of the parties the court finds that failure to make payments may jeopardize the health or physical well being of the employee or his dependents, the court may in its discretion order payment in whole or in part. Such proceedings shall be given priority over all other cases and such orders shall not be reviewable."

The above transcript is contained in district court Document #25.

The Judiciary committee of both Houses assumed it was not necessary to state that after benefits were granted the decisions by the Secretary were subject to judicial review under 5 U.S.C. 701 - 706. Public Law 89-488, Section 37 grants judicial review of the decisions of the Secretary under 5 U.S.C. 8128(a).

The Judiciary Committee, to make the statute constitutionally acceptable, stated in the Historical and Revision Notes under 5 U.S.C. 8128;

" The second sentence of former section 787 is omitted as included in the penultimate sentence of former section 793, which is carried into subsection (b). The last

sentence of former section 787 is omitted as executed.[3]
5 U.S.C. 8128(b)(1) states;

"(1) final and conclusive for all purposes and with respect to all questions of law and facts; and"

8128(b)(1) was added to allow the Secretary to decide how to best carryout the congressional intent of congress in holding hearings outside of the United States. The evidence is confirmed in U.S. Code, Congressional and Administrative News, 89th Congress, 2nd session 1966, page 2435, Senate report No. 1285 stating the legislative history on page 289 stating the changes under Public Law 89-488. It states the purpose as follows;

"SECRETARY'S RULEMAKING AUTHORITY IN EMPLOYMENT OUTSIDE THE UNITED STATES

> Sec. 12. Section 32 of the Federal Employees' Compensation Act is amended by adding the following: "in the adjudication of claims under section 42 of this Act, the Secretary shall have authority to determine the nature and extent of the proofs and evidence required to establish the right to benefits under the Act without regard to the date of injury or death for which claim is made."

The Secretary has used 8128(b)(1)to commit fraud upon the

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[3] The second sentence of section 787, carried into 5 USC 8128(b) states; "In the absence of fraud, or mistake in mathematical calculations, the finding of facts in, and the decision of the Secretary upon, the merits of any claim presented under or authorized by this Act if supported by competent evidence shall not be subject to review by any other administrative or accounting office, employee, or agent of the United States." Emphasis added An em dash was used in the codification of 5 U.S.C. 8128(b), ("is- not subject") to indicate there was a break in the sentence.

courts. Former section 793 applied to non citizens outside the United States. Prior to July 4, 1966 there were no hearings held regarding the initial decision for either citizen or non citizens. The decisions were made by the Director based on statements from the injured employee and the immediate supervisor. It was not until after the claim had been allowed under Section 770 now 5 U.S.C. 8122 that the decisions were appealable to the Employees Compensation Appeals Board under 5 U.S.C. 787. Congress under Public Law 89-488 changed the statute to allow a hearing on the initial decision before the Director. It therefore removed the language in former section 787 which stated;

"In subsection (a), the words "If the original claim for compensation has been made within the time specified in section 770 of this title" are omitted as surplusage."
By eliminating section 770 it allowed a hearing on the initial decision before the Director under 5 USC 8124. The statute did not allow review of the initial decision by the Employees' Compensation Appeals Board or the District court. Public Law 89-488 section 23 (e) applied to the evidence submitted to the director under former 5 U.S.C. 770, now 5 U.S.C. 8122. Section 23 (e) stated;

> "(e) All reports submitted to the Director under this section shall be confidential and not admissible in evidence in any administrative or judicial proceedings....shall not be used as evidence or any admission against interest for purposes of adjudication, litigation or determination of claims, whether administrative or judicial."

This case was initiated in the district court because the Secretary exceeded her/his authority, authorized by Congress. In lying to the courts the Secretary has denied the Petitioner due process by telling the courts judicial review

violated the statute and congressional intent.

Former section 793 applied to non citizens employed outside the United States. Further evidence that former section 793 applied to non citizens outside the United States is contained in the Historical and Revision Notes under 5 U.S.C. 8136 - 8138.
The change was to give both groups the right to appeal the initial decision before the Director.
The initial decision establishes jurisdiction and is constitutional. If the Secretary allows benefits, any decision after that time must be based on substantial evidence and the decision, by administrative board making the decision, is subject to Judicial Review.

An administrative board is not a judicial court and cannot decide judicial issues.

Canter case postulated a simple proposition;

``Constitutional courts exercise the judicial power described in Art. III of the constitution; legislative courts do not and cannot. American Ins. Co. v. Canter, 1 Pet. (26 US) 511, 545 (1828).

The Secretary has no authority from congress to render due process nor can congress give that authority under Article I without supervision from an Article III court. The evidence in the Petition showed that the Secretary has removed the safe guards provided under the separation of powers in the Constitution.

In Woodruff v. DOL, 954, F 2d 634, (11th Cir. 1992) the district court cited Cleveland Bd. of Education v Loudermill, 470 U.S. 532, 541, 105. S Ct. 1487, 1492, 84 L. Ed 2nd 494 (1985) regarding "Due Process" but failed to understand that

Loudermill had a right to have the court review the decision of the Board before either the state court or the federal court. He chose the federal courts. The Supreme Court stated these facts in that case but lower courts overlooked them in this case.
The Supreme Court stated;

> "In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.
> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislative may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards." (emphasis added)
> Cleveland Bd. of Education v. Loudermill, supra

The U.S. Constitution guarantees the right to due process under the Fifth and Fourteenth Amendment of the U.S. Constitution.
"No person shall be deprived of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

When the Supreme Court refers to an impartial decisionmaker it is not referring to an administrative board unsupervised by an Article III court. This court has cited the following;

> "In framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support."[4]

The Supreme Court stated the following in NORTHERN PIPELINE CO. v. MARATHON PIPE LINE CO., 458 US. 50 (1982) :

> "The use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson, 285 U.S. 22.* The congressional scheme challenged in *Crowell*

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[4] The high importance of the provision, as the contemporary history shows, was definitely pointed out by the leading statesmen of the time. Thus, in the Federalist, No. 78, Hamilton said: 'The complete independence of the courts of justice is peculiarly essential in a limited Constitution.' And in No. 79: 'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. ... In the general course of human nature, a power over a man's subsistence amounts to a power over his will.' (The italics are in the original.) [289 U.S. 516, 532] Chief Justice Marshall, in the course of the debates of the Virginia State Convention of 1829-1830 (pp. 616, 619), used the following strong and frequently quoted language:

> 'The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? "

O'DONOGHUE v. UNITED STATES, 289 U.S. 516 (1933)

> empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations ..."
> This court found that a decision beyond the initial decision, not reviewable by an Article III court violated the constitution.[5]

The Secretary has told the courts a lie and hid it by suppressing Public Law 89-488 dated July 4th, 1966. The Law was codified 60 days later as Public Law 89-554 on September 6, 1966, now referred to as Title 5. Because of the lie the Secretary has violated Procedural Due Process. The evidence would have shown that the Secretary terminated benefits then held a hearing to determine if the evidence supports the decision in violation of Public Law 89-488 Section 37. Under Section 37 benefits are not to be terminated until after the claimant has an evidentiary hearing and if the decision is sustained the claimant can petition the court.

Contrary to the statements by the district court the plaintiff cited that the Respondents also failed to provide benefits which congress granted under the statute.
Under 5 U.S.C. 8113 it states benefits shall be computed to keep pace with the wage-earning capacity of the individual

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[5] "*Id.* at 54. The agency did not possess the power to enforce any of its compensation orders: on the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court stressed that under the congressional scheme "'[t]he authority -- and the responsibility -- to make an informed, final determination . . . remains with the judge,'" 447 U.S. at 682, quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U.S. at 683."

which would probably have increased but for the injury. The Committee on the Judiciary, House of Representatives in H.R. Report 901 which accompanied H.R. 10104 to Enact Title 5, United States Code, Entitled "Government Organization and Employees" states; "The word "shall" is used in the mandatory and imperative sense."

How can an individual prove the Secretary has violated the statute and deny Gilmore benefits without reviewing the case record. The court has to review the actions of the Secretary for violating a clear statutory mandate which violates procedural due process, by withholding benefits which congress has granted without a fair hearing.

The Petitioner has been receiving benefits since 1978 and during that time not once were the benefits recomputed to the wages as provided under 8113. The Petitioner is receiving the same benefits that he received in 1978 with the only adjustment being the Cost of Living Adjustment (COLA) under 5 U.S.C. 8146a.

Had the court allowed the case to proceed the petitioner could have shown by substantial evidence that the respondents violated 5 U.S.C. 8101(4), 8106, 8113, 8123, 8124, 8128(a) and other sections in Public Law 89-488.

The Director's decisions after the initial decision have been arbitrary and capricious since the evidence did not support the decision. In most cases the decision was reversed by the Board. The abuse of congressional intent is getting benefits restored after the Board has reversed the Directors decision. Without judicial review provided by Public Law 89-488, section 37 the claimant is at the mercy of the Director when benefits will be restarted and when back benefits will be paid. In one instance it took 2 years without a payment. Most violations occurred because the Director never complied with the statutes and therefore never issued a decision to allow review by the Employees' Compensation Appeals Board.

The district court in issuing it's decision in this case is

endorsing a system of justice repugnant to the U.S. Constitution. It says that the Secretary can appoint a Board who sits at the pleasure of the Secretary without tenure and decide and interpret federal laws. The Secretary can ignore the statutes it is suppose to enforce. The Secretary can commit fraud under 18 U.S.C. 1001 and the courts cannot review the evidence. The Secretary can take property without review by an Article III court.
The board can make all decisions and those decisions are not bound by common law or statutory rules of evidence, by technical or formal rules of procedure, or by 5 U.S.C. 554 nor reviewable by the courts. The claimant can provide any evidence at a hearing before the representative of the Director, but the Directors representative decides what witnesses will be called. See last sentence 5 U.S.C. 8124(b)(2). If you disagree with the Hearing Representative for the Director, you can appeal the decision to the Board that sits in Washington, D.C. who does not call witnesses, therefore no cross examination of witnesses before the final decisionmaker.. The decision of the Board is final and not reviewable by any court.
What the district court implies and lets stand disregards the Declaration of Independence and U.S. Constitution as interpreted by this court regarding due process. The decisions have given the Secretary Of Labor absolute power without review. Power corrupts, and absolute power, corrupts absolutely.

Gilmore was given a hearing before the U.S.C.A. 11th circuit. He was informed that the judges had read the brief and they would be asking numerous questions. Only one judge asked a question. The only question asked was,
Q. Were you allowed to call witnesses?

A. I was not allowed to call the physicians.

This court has stated that due process requires there must be a formal hearing (fair hearing) where the party has the right to confront and cross examine those who have contributed to the evidence relied upon. This right is guaranteed under the 6th Amendment of the U.S. Constitution. Gilmore presented to the district court a letter sent to a physician by OWCP informing him he will never be called as a witness as the agency relies on the written report. The policy is also contained in the Rules and regulations. *See* Federal Registar / Vol. 62, No. 246 / Tuesday, December 23, 1997/ Page 10.

> "In most cases, the issues relate to written evidence (particularly medical evidence). A face-to-face hearing does little to clarify medical issues, since the determination, in most cases, must be made on the basis of written medical evidence in the file. A review of the written record has been selected, therefore, as an effective way to provide the review of the decision by a hearing representative ..."

This court stated, regarding the right to cross examination of physicians who contributed to the evidence, the following:

> "Review of the evidence is of no value to us. The vice is in the procedure which allows it in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts.
> The problem of the law is to give advantage to neither, but to let trial by ordeal of cross-examination distill the truth.
> To the extent that cross-examination is necessary to bring out the truth, the party must have it. . . ." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 37.
> RICHARDSON v. PERALES, 402 U.S. 389 (1971)

The evidence submitted to the district court contained Public Law 89-488 enacted on July 4, 1966. The legislative history of the Act citing, Senate report No. 1285 on page 2430-2436 confirming that no changes were made to the statute denying judicial review after the initial decision allowing benefits. U.S. Code, Congressional and Administrative News, 89th Congress, 2nd session 1966, pages 2430 - 2436, Senate report No. 1285 stating the legislative history and pages 284 - 290 stating the changes under Public Law 89-488.

The entire history of Section 37 beginning with June 5, 1924, ch. 261, Sec. 1, 43 Stat. 389, including the first codification of the Act under 5 U.S.C. 787, H.R. 10721, which became Public Law 89-488 on July 4, 1966 and H.R. Report 901 to accompany H.R.10104 Titled "ENACTMENT OF TITLE 5, UNITED STATES CODE, which stated the changes in the enactment of Title 5 under Public Law 89-554 enacted on September 6, 1966. The evidence also contained sworn testimony taken in the hearings of H.R. 10721. See Document #25 district court

Gilmore asked for an evidentiary hearing to present the entire transcript since it exceeded the length allowed in a petition or motion. The Motion was denied. *See* Document #18 district court. Gilmore has used the language that the Secretary has lied to the court throughout his case. A lie is when you know the truth but tell something else. Fraud is when you lie or withhold evidence to deceive.
The first witness to testify before the committee regarding H.R.10721 was the Solicitor of Labor, Charles Donohue and in his opening sentence stated;

"I am here to testify in support of H.R. 10721. This is an administration proposal which was suggested by the Department of Labor, by the Secretary of Labor, as a

suggestion for improvement of the Federal Employees' Compensation Act."

The sworn testimony states that the legislation was proposed by the Secretary. The Department knew what was contained in the Bill. Gilmore also cited the ECAB case, In the Matter of Adeline N. Etzel 1969, Page 150, 153 which shows that the Secretary knew that the codification of Title 5 did not change the previous intent in the law.
Evidence which the agency knew or should have known and failed to correct violates due process. That language was used in the Merit Systems, Prohibited personnel practices. 5 U.S.C. 2302

The actions by the district court violate Rule 56 when it issued a summary judgment. Not one piece of evidence cited above was attacked by the Respondents. The documents were printed by the U.S. Government Printing Office. They were official government documents. *See*, Document #25 district court.

The respondents ignored the evidence and cited the cases where the courts have accepted it's interpretation of 5 U.S.C. 8128(b). This case was to show congressional intent and not the conclusion reached by those courts who accepted the Secretary's interpretation.

The Secretary had a responsibility to attack the evidence presented to the district court in this case, not statements relied upon in previous cases. The Secretary failed to do so and therefore Rule 56 was not proper. The Secretary's interpretation of Lindahl, supra is a statement, it is not evidence.
The courts have spent a lot of time and financial resources regarding 5 U.S.C. 8128(b). They have expressed mixed opinions regarding the interpretation of what this court

meant when it cited 8128(b) in *Lindahl* . The 11th Circuit Court of Appeals states The Court can only review constitutional violations and statutory violations. It is not clear what statutory violations mean because the petitioner claimed violations under 5 U.S.C. 8101 e.g. and 18 U.S.C. 1001 and the court refused to hear the case.

5 U.S.C.8135 lump sum payment, demonstrates the abuse of authority and the monster the courts have unleashed by not reviewing the Legislative history to learn that the Secretary has lied to the federal courts in order to make his/her job easier Without the courts looking over his/her shoulder he/she has been free to abuse the statutes. When the courts denied judicial review it created a master, slave relationship allowing the master to abuse the slave.

The U.S.C.A. for the Fourth Circuit illustrates the ramifications in the interpretation of 5 U.S.C. 8128(b) by the Secretary. The issue was that the district court determined that the Secretary violated a clear statutory mandate in FECA requiring individual adjudications of requests for lump- sum payment of benefits

Judge Hamilton wrote the opinion, in which Judge Williams concurred. Part of the opinion is below.

> "Section 8149 permits the Secretary to regulate only to enforce and administer FECA, and enforcement of § 8135 by its regulatory repeal is a nonsensical result. The "prospective discretion" of 20 CFR 10.311 is no discretion, and abuse of discretion could have no clearer name. Regulatory repeal of § 8135 is a violation not only of § 8135 but of § 8149 as well. Whether considered from sound equitable principles or the coldest parsing of the statute, the Secretary's action is simply wrong.
>
> As phrased by Hanauer's counsel at oral argument, this appeal may well be "tilting at windmills" in a certain sense. It is undisputed that were this court to

remand the case for an individual review, and after doing so the Secretary still denied lump sum benefits to the claimant, the Court would have no jurisdiction under § 8128 to review his individual case. But that fact only raises a larger point. Were a bevy of Hanauers to return to district court with proof that the Secretary was performing pro forma individual review under § 8135, but actually meant to and did deny all requests, the Court's jurisdiction would reattach. The Secretary cannot do sotto voce by perfunctory denials what this dissent would deny him the power to do outright by regulatory fiat. If individual review is meaningless, as Congress's § 8135 has now been made meaningless, the clear mandate of FECA is violated.
I therefore dissent and would affirm the district court." HANAUER, v. ROBERT B. REICH, SECRETARY OF LABOR, 82 F.3d 1304 (4th Cir.1996)

Agencies have the responsibility to make rules and regulations to carry out the statutes it is to enforce. It does not have authority to make rules contrary to congressional intent..

REASONS FOR GRANTING THE PETITION

This court has consistently stated;

"There is a strong presumption that Congress intends judicial review of administrative action. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review."

The language is not convincing and subject to several interpretations.

The court cannot say the evidence is convincing and contrary to legislative intent without reviewing the evidence, no more than a doctor can reach a conclusion without examination. This is the first opportunity to clarify whether 5 U.S.C. 8128 applies only to the plain language in the statute of "allowing or denying payment" or applies to all decisions after the initial decision. This Court has the responsibility to determine if 8128(b) applies only to employees outside the United States who are non-citizens as the previous codification under 5 U.S.C. 793 stated, or to both groups. The Supreme court stated it would review Workman's compensation cases on questions of importance on account of the national scope of the statute, under which they are rendered' Del Vecchio v. Bower, 296 U.S. 280 (1935).. Congress gave those receiving benefits under Federal Employees' Compensation Act under Section 37 the right to judicial review by an Article III court, since 1924 and the courts should not take it away without clear and convincing evidence to the contrary.

The rules and regulations by the Secretary deny the calling of physicians to allow cross-examination of written evidence. The policy violates the 6th Amendment U.S. Constitution. The Secretary's interpretation is not what congress meant nor what this court stated in CROWELL V. BENSON, supra. This court analyzed Crowell, supra, in NORTHERN PIPELINE CO. v. MARATHON PIPE LINE CO, supra and stated Crowell was constitutional because the courts made the final decision.

This court has never allowed an administrative board to be the final adjudicator after benefits were allowed in any Workers compensation cases since 1931. Those cases that have been cited for years are below.

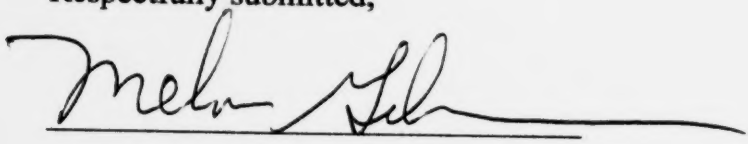
DEL VECCHIO V. BOWER, SUPRA (1935)
JOHANSEN v. UNITED STATES, 343 U.S. 427 (1952)
UNITED STATES v. DEMKO, 385 U.S. 149 (1966).

Finally, a Summary Judgment under Rule 56 was not proper since the plaintiff produced hard copy evidence from a government agency and the Secretary failed to attack the truthfulness of the evidence.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated in the petition.

Respectfully submitted,



Melvin Gilmore
1511 Oxford Heights Court
Englewood, Fl,34223
Telephone # (941)-474-5149

Date April 29, 2004
REVISED June 15, 2004

APPENDIX A
Dated February 3, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-16937-EE

MELVIN GILMORE,

Plaintiff-Appellant,

versus

U.S. Department of Labor, Director,
Office of Workers Compensation Program,
EMPLOYEES COMPENSATION APPEALS BOARD,
U.S. SECRETARY OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Florida

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__,_____F.2d____).

Before: BLACK, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing

En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Dated February 3, 2004

APPENDIX B
Dated November 10, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16937

D.C. Docket No. 01-01119-CV-8-T-27MAP

MELVIN GILMORE,

Plaintiff-Appellant,

versus

U.S. DEPARTMENT OF LABOR, Director,
Office of Workers Compensation Program,
EMPLOYEES COMPENSATION APPEALS BOARD,
U.S. SECRETARY OF LABOR,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 10, 2003)

Before BLACK, HULL AND COX, Circuit Judges.

PER CURIAM:

Appellant Melvin Gilmore appeals: (1) the district court's order, dated May 21, 2002, granting in part the Defendant-Appellees' motion to dismiss Gilmore's

complaint that sought judicial review of the Secretary of Labor's decisions relative to his entitlement to benefits, and (2) the district court's order, dated November 27, 2002, granting summary judgment in favor of Defendant-Appellees on Gilmore's remaining claims on the grounds that Gilmore had received due process.

On appeal, Gilmore contends that the district court erred: (1) be refusing to review the Secretary of Labor's decisions with regard to his entitlement to benefits, and (2) by concluding that Gilmore had received due process. After review and oral argument, we find no reversible error in the decisions of the district court and conclude that the district court properly determined that it lacked subject-matter jurisdiction to review Gilmore's claims under 5 U.S.C. 8128(b). See Woodruff v. United States Dep't of Labor, et al., 954 F.2d 634,639 (11th Cir. 1992) (citing Staacke v.United States Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988)); see also Lindahl v. Office of Personnel Management, 470 U.S. 768, 780,n.13, 105 S. Ct. 1620, 1627, n.13, 84 L.Ed.2d. 674 (1985).
AFFIRMED.

APPENDIX C
November 27, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN GILMORE, pro se
Plaintiff(s),

vs. Case No. 8:01-CV-1119-T-27MAP

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAM; et al.,

Defendant(s).
_____/

ORDER

Before the court is Defendants' Motion and memorandum for Summary Judgment as to Plaintiff's due Process Claims (Dkt. 21) and Plaintiff's Response to Court Order. (Dkt. 25).[1]
The Court having reviewed said pleadings and being otherwise full advised in the premises, concludes the Defendants' motion should be granted, the Court concluding that Plaintiff was not denied due process or the

---

1 In an earlier order, the court dismissed all but Plaintiff's due process claims, concluding that it did not have subject matter jurisdiction to review the Secretary of Labor's termination of Plaintiff's benefits. (Dkt. 19). As to Plaintiff's due process claims, the court treated Defendant's motion to dismiss as a motion for summary judgment pursuant to Rule 12(b), Fed. R. Civ.P. and gave Plaintiff notice of his rights under Rule 56 in accordance with Griffith v. Wainright, 772 F.2d 822,(11th Cir. 1985). (Dkt.23.

opportunity to fair hearings before the Office of Worker's Compensation Programs and the Employee's Compensation Appeals Board.

Standard Applicable to Motion for Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). On a motion for summary judgment, the court must review the record and all its inferences, in the light most favorable to nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655(1962). The existence of some
factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion. "The requirement that is there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248(1986). The substantive law applicable to the claimed causes of action identify wheich facts are material. Id.

Discussion

Plaintiff challenges the Secretary of Labor's termination of his benefits under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. 8101 et seq., alleging that the actions of the Office of Workers' Compensation Programs ("OWCP"), prevented him from submitting evidence to support a continuation of benefits and that the Employee's Compensation Appeals Board ("ECAB") denied him the opportunity to present evidence or cross examine witnesses in his appeals before the ECAB. Construing Plaintiff's complaint and arguments liberally, Plaintiff alleges that Defendants deprived him of his due process rights.

The Federal Employees' Compensation Act("FECA"), 5 U.S.C. 8101 et seq., bars judicial review of a decision of the Secretary of Labor awarding or terminating compensation under the FECA, except where a statutory mandate or prohibition has been violated or a complaint alleges a substantial, cognizable constitutional claim over which this Court would have jurisdiction. 5 U.S.C. 818(b). One exception is when a clear statutory mandate or prohibition has been violated or when there is a colorable constitutional claim. Woodruff v. United States Dep't of Labor, 954 F.2d 634,639-40 (11th Cir. 1992).

Plaintiff contends that Defendants deprived him of his due process rights by preventing him from producing evidence to support a continuation of benefits and the opportunity on appeal to present evidence or cross examine witnesses.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 3199, 333 (1976). "The government cannot deprive someone who has an entitlement to access to the courts to assert that right unless the government's interest outweigh those of the private litigant." See Woodruff, 954 F.2d at 641, citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 n.5 (1982).

Defendants have submitted the declaration(s) of Richard A Brettell, District Director of the U.S. Department of Labor, Office of Workers' Compensation Programs, in support of Defendants' argument that Plaintiff was afforded the full die process in the consideration of his claims to benefits, through multiple hearings and review proceedings, the opportunity to present evidence and the fact that Plaintiff continues to receive benefits to this day. Defendants argue that Plaintiff received numerous opportunities to present evidence before a Hearing Representative and to appeal decisions of the Hearing Representative to the ECAB.

In response, Plaintiff has submitted materials and his own "declaration", maintaining in a conclusory fashion that he was denied his due process rights during he decision making process, in that he was not afforded a "formal hearing for confrontation and cross examination". He does not dispute that material facts.

Undisputed Material Facts

According to the Declaration(s) of Richard Brettell and the record (Dkt. 14, p. 15; Dkt. 21, Exhibit T), the undisputed material facts are:

1. On January 19, 1978, Gilmore filed a claim for benefits with the OWCP, due to an alleged on the job injuey which occurred September 22, 1977. (Form CA-1, Exhibit A).

2. OWCP authorized disability compensation from January 1978 to March 1978. (Letter from Claims Examiner to Gilmore, Exhibit B).

3. In September 1978, Gilmore filed for compensation on a recurrence of his original claimed injury. He was placed on the periodic rolls from November 1978 to December 1981. Effective March 1982, Gilmore was issued a Scheduled Award based on a 5% permanent impairment disability and currently receives $1,036.00 per month. (Letter from Claims Examiner to Gilmore, Exhibit C; and OWCP computer printout of payment schedule for Gilmore, Exhibit D).

4. In December 1981, Gilmore filed another wage compensation claim which was denied based on the medical opinion that he had reached maximum medical improvement. Gilmore's file was left open for him to submit any medical bills related to his injury. As a result of this determination,

Gilmore requested and received a hearing at which he presented evidence. The Hearing Representative affirmed QWCP's decision and Gilmore appealed to the Employees' Compensation Appeals Board ("ECAB"). ECAB set aside the prior decisions and remanded the matter for further medical findings. (Decision of the Hearing Representative, Exhibit E; Decision and Order of ECAB, Exhibit F).

5. In January 1984, Gilmore's claim for wage compensation was again denied (Exhibit G) and he requested a hearing. OWCP filed a motion for remand since the approved position description was not part of the record. Gilmore appealed to ECAB for his case to be heard without the job description. Before ruling on the appeal, ECAB first granted the remand requested by OWCP. OWCP developed further evidence and denied the request for compensation in March 1985. (Exhibit H). ECAB then affirmed the decision denying wage compensation but approving the 5%disability finding in August1985. ECAB denied Gilmore's request for reconsideration (Exhibit I).

6. In 1986, following the regulations for continuing payment of benefits, OWCP asked Gilmore to attend a medical examination Gilmore refused and his benefits were suspended pending compliance with the law. Gilmore appealed the suspension of benefits but the ECAB affirmed the OWCP decision. Gilmore's motion for reconsideration was denied. (Exhibits J & K).

7. In 1990, Gilmore returned to a light duty position as agreed upon by his doctors and OWCP. (Exhibit L). In late 1990, Gilmore appealed the determination of his wage earning capacity of four hours per day but ECAB affirmed the wage earning capacity decision. (Exhibit M).

8. In 1995, OWCP discovered an overpayment to

Gilmore. Gilmore appealed the finding of overpayment to the Hearing Representative and requested a waiver. (Exhibits N & O). The Hearing Representative affirmed the overpayment finding and on appeal, ECAB increased the amount of the overpayment to be paid out of Gilmore's benefits. Gilmore's motion for reconsideration was denied by ECAB. Exhibits P,Q & R).

Due Process

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319,333 (quoting Armstrong v. Manzo, 380 U.S. 545,552 (1965)).

From procedural history summarized above, it is clear that Plaintiff's fundamental right to due process, the opportunity to be heard at a meaningful time and in a meaningful manner, has been provided to him throughout the handling of his FECA claim. Plaintiff has been afforded the opportunity to appear and be heard, or to appeal and seek reconsideration or remand at every step of the adjudication of his FECA claim(s). He presented evidence during at least three hearings and appealed to the ECAB on five different occasions, including motions for reconsideration.

Plaintiff has not raised a colorable constitutional

claim in that due process has been provided to Plaintiff and accordingly, this Court lack subject matter jurisdiction. Woodruff v. United States Department of Labor, supra. The FECA is designed to provide all administrative hearings and appeals remedies available to recipients of benefits under the Act. Congress enacted 8128 to protect the integrity of the process and preclude review of the decisions made by those charged with monitoring the claims. Gilmore has provided no evidence to show any Defendant violated a clear statutory mandate or failed to provide him with due process in the

adjudication of his claims, hearings or appeals.

Accordingly, it is ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment (Dkt.21) is GRANTED. The Clerk is directed to close this case and deny any pending motions as moot.

DONE AND ORDERED in chambers this 27th day of November, 2002.

JAMES D. WHITTEMORE
United States District Judge

APPENDIX D
Dated: May 20, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN GILMORE, pro se
Plaintiff(s),
Case No. 8:01-CV-1119-T-27MAP

vs.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAM: et al.,
Defendants(s).
_____/

ORDER

THIS CAUSE came to be considered on Defendants' Motion to Dismiss (Dkt. 14) and Plaintiff's Response to the Defendants' Motion to Dismiss (Dkt. 15). The Court having reviewed said pleadings and being otherwise fully advised in the premises, concludes that Plaintiff's claims against Defendants' should be dismissed in part, the Court concluding that it lacks subject matter jurisdiction to review the Secretary of Labor's termination of Plaintiff's benefits except to the extent that Plaintiff has alleged that he was denied the opportunity to fair hearings before the Office of Worker's Compensation Programs and the Employee's Compensation Appeals Board and thereby denied due process.

Standard Applicable to Motion to Dismiss

A court should not grant a motion to dismiss "unless

it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (citations omitted); accord South Florida Water Mangement Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996). The court will accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The Threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state claim. Ancata v. prison Health Services, Inc. 769 F.2d 700, 703 (11th Cir. 1985). Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. See Marshall County Bd. of Educ v. Marshall County Gas Dist., 992 F2d 1171, 1174 (11th Cir. 1993).

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. See Milburn v. United States, 734 F.2d 762,765 (11th Cir.1984). Consideration of matters beyond the complaint is improper in the context of a motion to dismiss. Id.

Discussion

Plaintiff brings this suit challenging the Secretary of Labor's termination of his benefits under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. 8101 et. seq. Plaintiff alleges that the actions of the Office of Workers' Compensation Programs ("OWCP"), prevented him from submitting evidence to support a continuation of benefits and that the Employee's Compensation Appeals Board ("ECAB") denied him the opportunity to present evidence or cross examine witnesses in his appeals before the ECAB. In sum, Plaintiff alleges Defendants deprived him of his due process rights. Defendant moves that the Complaint be dismissed for lack of subject matter jurisdiction pursuant

to Rule 12(b)(1).

After carefully reviewing and liberally construing Plaintiff's pro se Complaint (Dkt.1) and subjecting it to less scrutiny than one drafted by an attorney, the Court is compelled to dismiss those portions of Plaintiff's complaint to the extent that Plaintiff seeks judicial review of the Secretary of Labor's decision(s) relative to Plaintiff's entitlement to benefits, on the ground that this Court lacks subject matter jurisdiction [1]

The Federal Employees' Compensation Act ("FECA"), 5 U.S.C. 8101 et seq., bars judicial review of a decision of the Secretary of Labor awarding or termination compensation under the FECA, except where a statutory mandate or prohibition has been violated or a complaint alleges a substantion, cognizable constitutional claim over which this Court would have jurisdiction. 5 U.S.C. 8128(b)("The action of the Secretary or his designee in allowing or denying a payment under this subchapter is-(1) final and comclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.") See also Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 90 (1991), citing Lindahl v. Office of Personnel Management, 470 U.S. 768,780, n. 13 (1985) ("FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage"). See also Woodruff v. United States Dep't of Labor, 954 F. 2d 634,

---

[1] Plaintiff's complaint is a lengthy, rambling and difficult to understand attempt to seek judicial review of the laws applicable to benefits available to Federal employees, including the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq., the regulations promulgated thereunder, its legislative history and the ultimate decision(s) made relative to his claims.

639-40 (11th Cir. 1992) (only exceptions to the preclusion of a final decision of the Secretary in which a federal court may exercise jurisdiction are when a clear statutory mandate or prohibition has been violated or when there is a colorable constitutional claim.) Accordingly, the Court is barred from reviewing the Secretary's actions unless Plaintiff can show that the Secretary violated either a clear statutory mandate or makes a colorable constitutional claim.

Likewise, Plaintiff's allegations that the Secretary delegated the authority provided by 5 U.S.C. 8145 and 5 U.S.C. 8149, to the Director of OWCP, in processing and monitoring his claim, and the allegations that OWCP or ECAB failed to correctly interpret the provisions of the FECA or the regulations implementing the FECA, are barred from judicial review by 5 U.S.C. 8128(b). In this regard, Plaintiff has not sufficiently alleged or established a cause of action premised on a violation of a clear statutory mandate in the Secretary's processing of his claims, hearings or appeals. See Woodruff, 954 F.2d at 640-41 (unless a claimant can prove a clear violation, the Court does not have jurisdiction to interpret a statute that has more than one interpretation).

With regard to his purported constitutional claim, Plaintiff contends that Defendants deprived him of his due process rights by preventing him from producing evidence to support a continuation of benefits and the opportunity on appeal to present evidence or cross examine witnesses. He contends that the "informal hearing" deprived him of a fair hearing consistent with his due process rights. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976). "The government cannot deprive someone who has an entitlement to access to the courts to assert that right unless the government's interests outweigh those of the private litigant." See Woodruff, 954 F.2d at 641, citing Logan v.

Zimmerman Brush Co., 455 U.S. 422, 430 n. 5 (1982).

Defendants have submitted the declaration of Richard A. Brettell, District Director of the U.S. Department of Labor, Office of Workers' Compensation Programs, in support of Defendants' argument that Plaintiff was afforded full due process in the considerations of his claim to benefits, through multiple hearings and review proceedings, the opportunity to present evidence and the fact that Plaintiff continues to receive benefits to this day. Defendants argue that Plaintiff received numerous opportunities to present evidence before a Hearing Representative and to appeal decisions of the Hearing Representative to the ECAB.

In response, Plaintiff has submitted materials and his own "declaration", maintaining that he was denied his due process rights during the decision making process, in that he was not afforded a "formal hearing for confrontation and cross examination".

With respect to Defendants' Motion to Dismiss as it relates to Plaintiff's due process claims as described above, as both parties have submitted matters outside the pleadings, the Court will treat Defendants' motion as one for summary judgment and will dispose of same pursuant to Rule 56, Fed. R. Civ. P. pursuant to Rule 12(b), Fed. R. Civ. P.

Plaintiff is hereby advised of the provisions of Rule 56 of the Federal Rules of Civil Procedure: [2]

When a motion for summary judgment is supported by affidavits and/or other documents, the party opposing the motion may not depend upon the mere allegations in his pleadings to counter it. Pursuant to Rule 56, the party opposing the motion must respond with counter sworn affidavits and/or documents to set forth specific facts showing that there is a genuine issue of material fact in dispute which should be litigated at the trial. If the opposing party fails to respond to the motion or responds but the response does not comply with the requirements of Rule 56 as stated above, the Court may declare that the facts in the

affidavits and/or documents supporting the motion are established as true and that there is no genuine issue of material fact in dispute. In that event, if the applicable law allows, the party or parties who filed the motion will be entitled to have the motion granted and final judgment entered in his/their favor based upon the pleadings, depositions, answers to interrogatories, and answers to admissions filed along with affidavits; there will be no trial or further evidentiary hearing and the case will be ended in this Court.

2 Johnson v. Pullman, 845 F2d 911 (11th Cir. 1988.

Accordingly, it is ORDERED AND ADJUDGED that Defendants' Motion to Dismiss (Dkt. 14) is GRANTED in part. Any and all claims other than Plaintiff's claim that he was denied due process by not having been afforded a formal hearing and the opportunity to present evidence and cross examine witnesses are dismissed on the ground that this Court lacks subject matter jurisdiction.

Defendants shall have twenty (20) days from the date of this order within which to submit affidavits and other matters described in Rule 56 pertaining only to Plaintiff's due process claim and Plaintiff shall have twenty (20) days thereafter within which to submit any memoranda and/or documents described in Rule 56 (i.e. sworn affidavits, deposition transcripts, etc.) in response to Defendants' motion, pertaining only to Plaintiff's due process claim, after which the Court will take under advisement said motion. Any memoranda submitted shall conform with the Local Rules of the Middle District of Florida.

DONE AND ORDERED in chambers this _20__day of May, 2002.

JAMES D, WHITTEMORE
United States District Judge